Board of Alien Labor Certification Appeals
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'
DATE: April 3, 1997

CASE NO: 95-INA-507

In the Matter of:

TAI SHO RESTAURANT
Employer,

On Behalf of:

SHINICHI KIMURA
Alien

Appearance: J. C. Chang, Esq., Falls Church, Virginia

Before: Neusner, Holmes, and Huddleston
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Shinichi Kimura ("Alien") filed by Employer Tai Sho Restaurant, ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Atlanta, Georgia, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

An employer desiring to employ an alien on a permanent basis

must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[1]

Statement of the case. On April 12, 1994, the Employer filed an application for labor certification to enable the Alien, a Japanese national, to fill the position of Japanese Specialty Cook for Employer, the operator of a Japanese restaurant in Fayetteville, North Carolina. AF 64(b)-(c), 68-68(a); and see materials received from Atty Chang. The duties of the position were described as follows:

> Preparation of a variety of Japanese dishes including fish, meats, vegetables, and appropriate sauces and other Japanese dishes.

AF 68. No minimum educational level was stated, but two years of experience in the job offered was specified. The rate of pay was $7.00 per hour working from 11:00 AM to 2:00 PM and 5:00 PM to 10:00 PM daily in a forty hour week that ran from Wednesday through Sunday.[2] The CO noted that this position met the criteria for DOT Occupational Code No. 313.361-030, Specialty Cook, Japanese. AF 68.[3] While this job opportunity was publicized by advertising in a Japanese language newspapers and was duly posted, no responses were received and no U. S. workers were referred for this position. AF 71-72(a).

Notice of finding. By the Notice of Finding (NOF) issued on January 19, 1995, the CO found that the Employer had failed to advertise this position in a publication that was most likely to bring responses from able, willing, qualified and available U. S. workers, citing 20 CFR § 656.21(g). The CO observed that advertisement was published in The Yimuri Chimbum Newspaper, an unfamiliar publication, the masthead of which noted an office telephone number in Japan. Examining the documentation filed by the Employer, the CO found it to be impossible to determine whether or not it was a foreign publication, the city in which it

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[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

[2]This is above the local prevailing wage rate of $6.72 per hour.

[3]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

was published, its circulation, and how the newspaper could be obtained in the area where the Employer offered this position. By way of corrective action, the CO directed that the Employer must either provide documentary evidence to rebut these findings or readvertise the position in an appropriate newspaper of general circulation in the area of intended employment,such as The Raleigh News and Observer.

Noting the split shift specified by the application, the CO said this preference was a job requirement under 20 CFR § 656.21 (b)(2)(iv), which the Employer must establish was not unduly restrictive.[4] Unless business necessity was clearly documented, the regulations strictly prohibit restrictive job requirements, said the CO, adding that the Employer must show that such job requirements bear a reasonable relationship to the occupation in the context of its business and are essential to the performance of the job in a reasonable manner. The CO then added that mere inconvenience to the Employer or somewhat higher operating costs arising from the use of a worker without the restrictive job requirements would not establish their business necessity. By way of correcting this defect, the CO directed that the Employer either provide documentary evidenced of the business for the split shift work schedule or drop the requirement.

Finally, the CO noted that 20 CFR § 656.20(c)(8) requires the Employer to document that sufficient funds are available to guarantee the wages to be paid the Alien in this position, and that the Employer's documentation was insufficient in that regard. The CO then listed ten(10) categories of documentation that the Employer was required to file on the issue of its capacity to pay the Alien the wage indicated in the application.

Rebuttal. The Employer offered evidence to support its capacity to pay the wages necessary to compensate a worker holding the position at issue in the documentation it filed on February 21, 1995. AF 41-52. While the Employer's attorney noted in his letter that split shifts are common to the restaurant industry and briefly discussed this practice, the Employer did not submit documentation or any evidence of this fact in its rebuttal, and the remarks of counsel cannot be treated as evidence.

Final Determination. The CO denied certification by his Final Determination (FD) of March 22, 1995, after which the applicants appealed to BALCA (the Board, BALCA). As the Employer amended the application to specify the days of the week during which the Alien would work at the position at issue, that issue

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[4]The CO also said the Employer had not specified the days of the week during which the Employee was to work in the original application. AF 64(b). On February 15, 1995, the application was amended to indicate that the work week ran five days from Wednesday through Sunday. AF 68.

is deemed to be moot. In addition, in spite of the question as to the weight due counsel's representations of fact in his letter transmitting the rebuttal documentation, the CO failed to mention the adequacy of the Employer's newspaper advertisement in the FD. The CO there said, "Issues not discussed have been satisfied by the rebuttal evidence." As a consequence, it is found that the CO waived that reason for denying certification.

After analyzing the Employer's documentation of its capacity to pay to the Alien the wages it described in its application, the CO concluded that it does not have sufficient funds to pay him, and for this reason denied certification. The only reason for denial of certification is that, "[T]he employer has a similar application pending for an additional Specialty Cook" and, as a consequence, "[T]he Certifying Officer concludes that the employer does not currently have sufficient funds to pay the wages of not only one additional cook, but the $29,000 combined salaries offered to both aliens."

Discussion. The CO's reasons for denying certification are rejected as illogical and as contrary to the principles of due process that govern this proceeding.

First, the CO explicitly found the amount of the Employer's operating cash flow, which is a sum adequate to pay the wages of this Alien. Taken without more this is a finding that the Employer's documentation sustained its burden of proof on this issue. Second, the CO found that another unnamed alien is the subject of a similar application for certification by the same Employer at this time, that the combined wages of both this Alien and the alien in that second case exceed the Employer's present capacity to pay, and that this is a sufficient reason to deny certification in this case.

Because the CO denied certification on the sole basis of undisclosed evidence in an unidentified matter that is outside this record it is contrary to law. By weighing documentation in that second proceeding without incorporating that evidence into this case, the CO admittedly went beyond the record concerning the certification of Mr. Kimura, the Alien in this proceeding. As this application encompasses the only authority delegated to the CO in this matter, the CO could not decide this case on the basis of facts in a different case that were not included in this record. As the CO nevertheless imported into his deliberations documentation that apparently was before him in that second case without notifying the Alien that he intended to do so and without giving him an opportunity to confront and respond at the time of rebuttal, the CO has deprived both Mr. Kimura and the Employer of

their most elementary rights of due process.[5]

It follows that the CO's finding that the Employer could not afford to pay two new employees, an issue that was in no way identified in the NOF, is a nullity and must be rejected. What remains are the CO's findings (1) that the Employer duly tested the labor market in the manner required by the regulations, and (2) that no U. S. worker is available for this job opportunity. Accordingly, the applicants have complied with the Act and regulations, and certification should issue, as directed by the order that follows.

ORDER

1. The Certifying Officer's denial of labor certification is hereby reversed, as it is contrary to law.

2. This matter is remanded to the Certifying Officer with instructions to issue forthwith the certification requested by the Employer and the Alien.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

[5]To the extent that in considering this matter the CO may have wandered into the second case and pre-emptively decided matters that relate to that unknown alien as well, he may have adjudicated issues concerning interests beyond his jurisdiction under the regulations. Under such circumstances his actions were ultra vires and have no legal validity beyond this application.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **TAI SHO RESTAURANT**, Employer,
SHINICHI KIMURA, Alien

Docket No. : 95-INA-507

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: March 6, 1997